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COURT OF CRIMINAL APPEALS
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In The

Court of Criminal Appeals

Austin, Texas

FILED
COURT OF CRIMINAL APPEALS
10/14/2019
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ANTHONY CARTER, *Appellant,*

v.

THE STATE OF TEXAS, *Appellee*.

On Discretionary Review from 07-18-00043-CR
Seventh Court of Appeals

On Appeal from 2017-413,558
In the 137th Judicial Court of Lubbock County, Texas

APPELLANT'S BRIEF ON THE MERITS

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IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 68.4(a) the following is a complete list of the names of the parties and their counsel.

PARTIES	COUNSEL
Appellate Panel	Chief Justice Brian Quinn (opinion author) Justice Patrick Pirtle Justice Judy Parker
Trial Judge	The Honorable Billy Eichman, III 364th Judicial District, Lubbock County
Anthony Carter Defendant / Appellant	***Trial Counsel*** Charles Chambers, Attorney at Law 915 Texas Avenue Lubbock, Texas 79423 ***Appellate & PDR Counsel*** Allison Clayton The Law Office of B. Allison Clayton P.O. Box 64752 Lubbock, Texas 79464-4752
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STATEMENT OF THE CASE

A jury convicted Appellant of possession of a controlled substance weighing 400 grams or more in Penalty Group 2-A. (9RR65). Later that day, the jury sentenced Appellant to 90 years' incarceration and a $100,000 fine. (CR44; 9RR156-57).

On direct appeal, following supplemental briefing ordered by the court and oral arguments, the Seventh Court of Appeals affirmed Appellant's conviction. *Carter v. State*, 575 S.W.3d 892 (Tex. App.—Amarillo May 14, 2019, pet. filed).

Appellant did not file a motion for rehearing. His petition for discretionary review followed, which the Court granted (without oral argument) on September 11, 2019.

ISSUE PRESENTED

Background

In 2015, the Texas Legislature made sweeping revisions to how "controlled substances" are defined in the drug possession statutes. Before the revisions, the statute implicated in this case—Section 481.1031, which defines a Penalty Group 2-A substance—was a list of prohibited substances. The problem, however, was that chemists would slightly alter one of the listed substances, making it technically no longer the prohibited substance but nevertheless a dangerous one. With the Legislature only meeting every two years, Texas law was simply not able to keep up with clandestine chemists. The 2015 revisions were the Legislature's response.

In the revisions, the Legislature did away with the list of drugs, choosing instead to list several chemicals and detailing which molecular structures of the various listed chemicals (as they relate to one another) are prohibited. Consequently, Section 481.1031, is now, by necessary design, extremely complicated. In a published opinion, the court below inferred a substance met the molecular structural requirements of Section 481.1031 even though (by the court's admission), there was no direct evidence of that molecular structure in the record.

Ground on Which the Court Has Granted Review

In a sufficiency analysis, may the court of appeals infer evidence establishes elements of the offense defined by technical terms if no such evidence was presented at trial?

Statement of Facts

Appellant, Anthony Carter, was a successful Lubbock businessman. He ran his business—a smoke shop—entirely in the public eye. (4RR79; 5RR86, 5RR131). He did everything a normal business owner would do: He reported income, paid taxes, stocked inventory, kept track of sales, had posted store hours, and deposited money into his bank account. (5RR99, 6RR48-49, 6RR169).

Appellant was not, however, a chemist. When local law enforcement told Appellant some of his products may contain banned substances, Appellant found a DEA-certified lab, sent his products to that lab, and paid the lab to test those products. He paid for new rounds of testing around every six months and did so for years. Each time, the lab issued written reports certifying there was nothing illegal in any of Appellant's products. (State's Exs. 70C, 70D, 70E, 123, Defense Ex. 5).

But, the State averred, the lab got it wrong: There was one illegal substance—fluoro-ADB—in Appellant's product. (7RR19). Police seized Appellant's inventory and charged him with possession with the intent to deliver more than 400 grams of a controlled substance. A jury found Appellant guilty. It sentenced him to ninety years' incarceration and a $100,000 fine. The conviction was affirmed on direct appeal. Appellant filed a Petition for Discretionary Review, which was granted. The instant Brief on the Merits follows.

SUMMARY OF THE ARGUMENT

Under *Jackson v. Virginia,* courts affirm convictions if, viewing the evidence in the light most favorable to the verdict, the jury could have found the elements of the crime beyond a reasonable doubt. While this standard dovetails very well with most crimes, some offenses involve highly technical elements. In those cases, the State simply brings in an expert to help prove guilt. The instant case involves the most complicated criminal statute in Texas—the penalty group classification for possession offenses. Because the law prohibits chemicals with a variety of possible molecular structures, only molecular chemists can discern the statute's meaning.

The State's expert witness at trial testified as to the presence of chemicals in a substance Appellant sold at his smoke shops. The expert did not, however, testify as to the molecular structure of those chemicals. The court below, relying on *Jackson*, affirmed the conviction. It held ordinary jurors could have taken the expert's testimony about the presence of chemicals in the compound and inferred the molecular structure of the overall compound. In doing so, the court stretched *Jackson* too far. The *Jackson* standard only extends as far as an ordinary person's common sense, and an ordinary person cannot infer molecular structure. The State failed to prove each element, and reasonable inference was inadequate to bridge that failure. Because the court misapplied *Jackson*, reversal is appropriate.

ARGUMENT

THE COURT OF APPEALS ERRED IN INFERRING AN ORDINARY JUROR COULD DEDUCE TECHNICAL ELEMENTS NOT PROVEN BY THE EVIDENCE AND OUTSIDE THE SCOPE OF KNOWLEDGE OF AN ORDINARY PERSON

I. THE ELEMENTS OF SECTION 481.1031(B)(5)

A. THE COMPLEX LANGUAGE OF SECTION 481.1031(B)(5)

Appellant was found guilty of possessing a significant amount of synthetic marijuana, a Penalty Group 2-A substance, as detailed in Section 481.1031(b)(5) of the Texas Health and Safety Code:

> (b) Penalty Group 2-A consists of any material, compound, mixture, or preparation that contains any quantity of a natural or synthetic chemical substance . . . listed by name in this subsection or contained within one of the structural classes defined in this subsection:
> . . .
> (5) any compound containing a core component substituted at the 1-position to any extent, and substituted at the 3-position with a link component attached to a group A component, whether or not the core component or group A component are further substituted to any extent, including: [a list of chemicals]

TEX. HEALTH & SAFETY CODE ANN. § 481.1031(b)(5).

B. NOT EVEN THE LEGISLATORS WHO PASSED SECTION 481.1031(B)(5) UNDERSTAND WHAT IT PROHIBITS—ONLY A CHEMIST CAN UNDERSTAND THE SUBSTANCE OF THE STATUTE

Most people reading the language of Section 481.1031 quoted above will quickly pass over the words as their eyes glaze over, but the law was not always so complicated. Before 2015, the statute simply listed out prohibited substances. Act

of May 22, 2015, 84th Leg., R.S., ch.65, S.B. 173 (amended 2015) (current version at TEX. HEALTH & SAFETY CODE ANN. § 481.1031(b)(5)).

The problem, however, was that clandestine chemists would tweak the molecular structure of a listed substance. The changed structure resulted in a new substance, which was not on the list of prohibited substances but was still just as dangerous. The Legislature would meet and revise the penalty group list. But with the Legislature only meeting every two years, the chemists were always able to stay one step ahead of the law. Debate on Tex. S.B. 173 Before the Senate Crim. Justice Comm., 84th R.S. at 1:32:20 (Mar. 10, 2015) (recording available from online Tex. Senate Archives).

By 2015, the Legislature was tired of playing games. It amended the statute so that clandestine chemists could no longer evade the law simply by moving a molecule here or there. *Id.* But those necessary amendments were beyond the skill of any non-chemist. Even the legislators who passed the bill did not know what the statute's language meant. They just knew—from working with the Senate's resource chemist—that this was the language they needed to pass for the safety of Texans at that particular time. *Id.* at 51:56-52:20 (recording the author of the bill saying "[r]eally, to me, it's the chemist who we relied on on these bills more than even the lawyers because that was what - - the code we've been trying to crack.").

II. The Evidence Did Not Directly Address Each Element of Section 481.1031(b)(5)—A Failing No One Disputes

An ordinary person can safely say that a substance is illegal if it:

1) contains a core component
2) that is substituted at the 1-position
3) to any extent
   and
4) substituted at the 3-position
5) with a link component
6) which is attached
7) to a group A component

TEX. HEALTH & SAFETY CODE ANN. § 481.1031(b)(5)). Whatever those words mean, those are the elements of a substance prohibited under Section 481.1031(b)(5).

A. The Evidence Presented at Trial

Appellant was found guilty of possessing a substance called fluoro-ADB. At trial, the State's expert testified about fluoro-ADB and the three components of Section 481.1031(b)(5). He talked about the core component, the link component, and the group A component he found in the fluoro-ADB. (7RR19). He testified fluoro-ADB's core component is indazole; its group A component is methoxy dimethyl oxobutane; and its link component is carboxamide. 7RR19. He reasoned as long as one of each of the components is present, the drug is illegal. 7RR19 ("[B]ased off of those three combinations, that's why it is able to be controlled under the structural class with how the law is currently written.").

B. The Evidence Not Presented at Trial

The State's expert never talked about the position of each component relative to one another. He said fluoro-ADB's core component is indazole, but he never said whether that indazole had any substitutions at any position. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.1031(b)(5) (outlawing "any compound containing a core component *substituted at the 1-position* to any extent, *and substituted at the 3-position* . . . ") (emphasis added). He said fluoro-ADB's link component is carboxamide, but he never said how the carboxamide related to the indazole (the core component). *Id.* (outlawing "any compound containing a core component *substituted* . . . *at the 3-position* with a link component . . .") (emphasis added). Finally, he said fluoro-ADB's group A component was methoxy dimethyl oxobutane, but he again failed to discuss whether that group A component was attached to the link component. *Id.* (requiring the link component to be attached to a group A component).

No one disputes these failings. At the court below, both sides were asked to find the testimony discussing how the components related to each other. Both sides reached the same answer: there is no such testimony. *See* State's Supplemental Brief, pg. 7 (Feb. 19, 2019). In its opinion, the court below acknowledged,

> The prosecutor asked the forensic chemist, "So if we put all of those together . . . . We see the portions of fluoro-ADB that are relevant to this; is that correct?" The chemist answered, "Correct. . . . [B]ased off of those three combinations, that's why it is able to be controlled under the structural class with how the law is currently written." Sadly, the chemist was not asked to clarify the latter statement. This is of import because § 481.1031(b)(5) speaks in terms of certain chemicals having a specific placement within the molecular structure of an illegal compound.

Carter, No. 07-18-00043-CR, pg. 6.

No one really seems to understand what the words of Section 481.1031(b)(5) mean, but everyone agrees that the elements of the provision require both the presence of certain chemicals and that those chemicals are structured in a certain way relative to one another. And everyone agrees the latter set of elements was never directly established by the evidence.

III. The Court Below Expanded the Assumptions Permitted by *Jackson v. Virginia* into the Realm of a Highly Technical Areas of Evidence (Molecular Chemistry) Outside the Understanding of an Ordinary Juror

A. The *Jackson v. Virginia* Jurisprudence Does Not Permit a Reviewing Court to Impart Specialized, Technical Knowledge on Ordinary Factfinders

At its heart, this case involves a sufficiency-of-the-evidence issue. What makes this kind of case unique is that the revised statutory language establishing the elements of drug possession offenses is now highly technical.

> When reviewing a legal sufficiency challenge, we view all of the evidence in the light most favorable to the verdict to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Ross v. State, 543 S.W.3d 227, 234 (Tex. Crim. App. 2018) (*quoting Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

Most cases will pass this sufficiency review even if there is no direct evidence as to every element. Jurors are ordinary people capable of drawing reasonable inferences. So, for example, if the evidence establishes defendant shot the victim in the torso and the charge is murder, then a rational factfinder could infer that the defendant murdered the victim even without direct evidence connecting every dot.

If the evidence establishes defendant broke into a car, and a phone that was on the front seat of the car before the break-in was not there after the break-in, then a rational fact-finder could conclude defendant stole the phone. That deduction is reasonable and well-within an ordinary person's experiences and common sense. In most criminal cases, a rational juror can connect the dots, and the court of appeals should assume that is what the jury did in reaching their verdict. *Jackson*, 443 U.S. at 316, 99 S.Ct. at 2781; *Ross*, 543 S.W.3d at 234; *Laster*, 275 S.W.3d at 517.

But what about cases where the offense is outside the scope of an ordinary person's intelligence, experience, and understanding? The "rational trier of fact" envisioned in the *Jackson* jurisprudence has no specialized training. *See Jackson*, 443 U.S. at 316; *Ross*, 543 S.W.3d at 234; *Laster*, 275 S.W.3d at 517. That is where expert witnesses step in. *See* TEX. R. EVID. 702 (permitting expert witnesses to "testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue"). It is for this reason that at driving while intoxicated trials the State presents a toxicologist who tested the defendant's blood. Just showing the jury a vial of blood is useless. They cannot discern any information from that vial. They need an expert to conduct testing on that blood and tell them what the results were.

Similarly, just showing the jury a package of a powder that *could be* illegal is of no help. Rational triers of fact cannot determine the chemical structure of a compound just by looking at it. They need an expert who has analyzed that substance to tell them what the chemical structure is. Without such detailed expert testimony, the jury is not equipped to know whether the substance is illegal. And a reviewing court errs in assuming that "close enough" is authorized under *Jackson* when dealing with evidence that can only be established through an expert.

B. The Court Below Stretched *Jackson* Jurisprudence Too Far When It Applied the *Jackson* Presumptions to Jurors Evaluating the Elements of the Highly Technical Drug Possession Statute

After the 2015 revisions, a rational juror's common sense will be of little help in understanding whether a defendant committed a drug possession offense. The State cannot say "defendant possessed fluoro-ADB" and expect an ordinary juror to understand what that means. More to the point, a discussion about molecular structure *in general* does not equip a jury to make any conclusions about the molecular structure of the specific compounds in a case. An ordinary factfinder cannot rely on his own common sense to make the leap from the general to the specific in the highly technical area of molecular chemistry.

And yet, as the court below observes, the only evidence in the case was very general in nature. For example—as the court below observed—the State's expert said things like:

- "we are looking at the structural class, now we are actually looking at the structure itself and seeing if that falls within a particular combination of groups."
- the "law classifies three different parts of the molecule"
- "based off of those three combinations [of indazole, methoxy dimethyl oxobutane, and carboxamide], that's why it is able to be controlled under the structural class and how the law is currently written"
- "I can at least tell you that [fluoro-ADB is] the indazole ring group"

Opinion, pgs. 7-8. No ordinary juror will hear a statement like "I can at least tell you that [fluoro-ADB is] the indazole ring group" and be able to deduce that that means fluoro-ADB has indazole substituted at either the 1-position or the 3-position with carboxamide which is attached to methoxy dimethyl oxobutane.

And it does not matter how many general statements one piles on. Adding "that's where the fluorine is actually attached to a particular carbon" or "we now classify a synthetic compound by the structure" or "there are a whole bunch of different combinations of structures" or a thousand more general comments is *still* not going to get the jury to the conclusion that fluoro-ADB has indazole substituted at either the 1-position or the 3-position with carboxamide which is attached to methoxy dimethyl oxobutane. *See id.*, pgs. 7-8.

Ten thousand spoons do no good for someone who needs a knife. The statute mandates a specific structure. Not the mere presence of certain chemicals, not combinations of chemicals—a specific molecular structure.[1] The chemist's general comments did not equip the jury with the specialized knowledge it needed to determine whether Appellant possessed a substance outlawed by Section 481.1031(b)(5), as alleged in the indictment. (CR6).

[1] The court below also references the packaging of the product Appellant was selling, but the point remains: No ordinary juror could look at a package of suspected drugs and know the molecular structure of the substance contained in that packaging. It ought to take actual evidence for suspicion to evolve into conviction.

Jackson contemplates an ordinary person as a rational trier of fact and imparts upon him the ability to make reasonable deductions from the evidence based on common experiences and sense. *Jackson* does not, however, relieve the State of its burden in proving the elements of technical statutes beyond an ordinary person's comprehension.

The court below stretched *Jackson* jurisprudence too far by applying it to highly technical elements of a statute—elements outside a normal person's understandings and not directly supported by the evidence. It relieved the State of its burden of proof. And there is no basis in caselaw to support the court's action. No court expects an ordinary juror to comprehend molecular chemistry. But that is the tacit assumption the court below made in affirming Appellant's conviction. Neither *Jackson* nor any other case supports extending the sufficiency doctrine so far.

PRAYER

Appellant Anthony Carter prays the Court will reverse the decision of the court below and either render an acquittal or remand the case back to the court below for further proceedings consistent with the Court's opinion.

Respectfully submitted,

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Certificate of Service

I certify that on October 11, 2019, a copy of this brief was served on opposing counsel, Lauren Murphree of the Lubbock County District Attorney's Office, via the State e-filing service. I additionally certify that on this day service was made via State e-filing service to Stacey Soule, the State Prosecuting Attorney, at information@spa.texas.gov.

/s/ Allison Clayton
Allison Clayton

Certificate of Compliance

I certify the foregoing Petition for Discretionary Review complies with Rule 9.4(i)(2)(B) of the Texas Rules of Appellate Procedure. The brief, excluding those portions detailed in Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure, is 2,735 words long. I have relied upon the word count function of Microsoft Word, which is the computer program used to prepare this document, in making this representation.

/s/ Allison Clayton
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